Supreme Court, U.S.
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NO. 85-1163

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1985

WILLIAM SAMPLE and KAREN SAMPLE, husband and wife, and JAMES SHELTON,
Petitioners,

v.

REGINALD JOHNSON, Deputy Commissioner for the Office of Workers' Compensation Programs for District 14; and SEATTLE STEVEDORE COMPANY; and EDWARD LOPIT; and PAUL TOMITA; and NAHUM LITT, Chief Administrative Law Judge, Office of Administrative Law Judges; and RAYMOND DONOVAN, United States Secretary of Labor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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89 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the district court's judgment that it had no admiralty jurisdiction under 28 U.S.C. 1333 to consider longshoremen's allegations that they were damaged by defendant self-insurer's bad faith violations of the Longshoremen's and Harbor Workers' Act (LHWCA) and breach of duties imposed by general maritime law?

2. Was the Court of Appeals correct in its decision that the exclusivity and penalty provisions of the LHWCA barred longshoremen's actions against defendant self-insurer for damages arising out of injuries not covered by the LHWCA?

PARTIES

Parties to the appeal sought to be reviewed include a.) federal defendants: Reginald Johnson, Deputy Commissioner for the Office of Worker Compensation Programs for District 14, Nahum Litt, Chief Administrative Law Judge, and Raymond Donovan, United States Secretary of Labor; and b.) private defendants: Seattle Stevedore Company, Edward Lopit, and Paul Tomita. Only that portion of the Court of Appeal's judgment relating to the private defendants is sought to be reviewed.

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2(a) Larson Workmen's Compensation
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The judgment of the Ninth Circuit Court of Appeals is reported at 771 F.2d 1335 (1985). The judgment of the United States District Court for the Western District of Washington giving rise to the appeal is not reported in the Federal Supplements, but is reported at 16 BRBS 146 (1984). Both opinions are reproduced in the Appendix to this Petition.

JURISDICTION

(i) The Ninth Circuit Court of Appeals filed its judgment in Sample, et al. v. Johnson, et al., 771 F.2d 1335 (1985) on September 20, 1985.

(ii) The order denying the plaintiff's petition for rehearing was filed on October 25, 1985.

(iii) No cross-petition for writ of certiorari has been filed.

(iv) Statutory authority conferring jurisdiction on the United States Supreme Court to review the judgment in question by writ of certiorari is premised upon 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

The following Constitutional provisions are involved: The United States Constitution, Article III, Section 2, cl. 1, states:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof,

and foreign States, Citizens or Subjects."

STATUTES

28 U.S.C. Section 1331 - Federal question; amount in controversy; costs:

(a) The district courts shall have original jurisdiction of all civil action wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. Section 1333 - Admiralty, maritime and prize cases:

The district court shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. Section 1361 - Action to compel an officer of the United States to perform his duty:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of

the United States or any agency thereof to perform a duty owed to the plaintiff.

33 U.S.C. Section 902(2) - Definition of injury:

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. Section 905 - Exclusiveness of liability:

(a) The liability of an employer prescribed in section 4 [33 U.S.C. Section 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife,

parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. Section 907(a) - Medical services and supplies:

(a) **General Requirement.** The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. Section 914(e) and (f) - Payment of compensation:

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless

such non-payment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payments has been issued by the Board or court.

33 U.S.C. Section 928(a) - Fees for Services

(a) If the employer or carrier declines to pay any compensation on or before the thirteenth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of this claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

STATEMENT OF THE CASE

a.) Jurisdiction

This action was brought by two longshoremen in the District Court of the Western District of Washington against federal defendants responsible for administering the adjudication of claims filed pursuant to the LHWCA, 33 U.S.C. Section 901, et seq., and the self-insurer responsible for handling longshoremen's claims to benefits under the LHWCA. Paragraph 1 of the longshoremen's complaint alleged that:

> "1. This action arises under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. . . . and under the admiralty and maritime law, as hereinafter more fully appears. This court has jurisdiction under 28 U.S.C. Sections 1331, 1333, and 1361."

The longshoremen asserted in other allegations of their complaint that the federal defendants had violated the LHWCA by

failing to hold hearings on their claims within the time periods mandated by the Act. Against the private self-insurer, the longshoremen alleged that the bad faith handling of their compensation claims had caused them injuries. In this regard, the longshoremen specifically averred that the private defendants had knowingly and in bad faith violated the LHWCA and the general maritime common law.

b.) **Facts**

William Sample and James Shelton are longshoremen. Sample injured his back while working as a longshoreman on March 28, 1983. Shortly after his injury, he filed a claim for medical and compensation benefits against his employer, Seattle Crescent Container Corp., under the LHWCA. Seattle Stevedore Company, the self-insurer arm of his employer, initially began paying compensation and medical benefits under the

LHWCA. When Sample's back condition did not improve, his treating physician recommended that he undergo a type of back surgery requiring hospitalization. Sample secured authorization from Seattle Stevedore under Section 7 of the Act to undergo this treatment. Thereafter, Sample was hospitalized and underwent surgery. Shortly after Sample was released from the hospital, Seattle Stevedore controverted his LHWCA claim and refused to pay for his hospitalization or any follow-up care relating thereto. When Seattle Stevedore refused to follow the informal recommendation of the deputy commissioner to pay compensation and medical benefits, Sample sought an expedited hearing before the Office of Administrative Law Judges to resolve the issue. While waiting for the hearing, Sample was without income and could not obtain adequate therapy. A hearing was

finally held on his claim on March 17, 1984, and on April 24, 1984, an administrative law judge ordered the employer to pay Sample his medical costs and compensation under the Act. Sample claimed the failure to provide him medical benefits and compensation caused him emotional distress and other injuries.

James Shelton was injured on April 26, 1982, while in the course of his employment as a longshoreman. Shortly thereafter, he filed a timely claim for benefits. At first, Seattle Stevedore paid him full compensation, but later reduced his compensation payments substantially. When Seattle Stevedore refused to comply with the informal recommendation of the deputy commissioner to raise his benefits to their previous level, Shelton requested an expedited hearing before the Office of Administrative Law Judges. This request was made on January 28, 1983. On May 20, 1983,

Seattle Stevedore controverted the claim and stopped payment of compensation altogether. A hearing was finally held by the Office of Administrative Law Judges on October 27, 1983. Approximately four months later, on February 15, 1984, the administrative law judge found that Shelton was permanently partially disabled and entitled to compensation. During the time that Shelton's compensation was reduced and finally discontinued, his family depleted its savings, was threatened with eviction, and lost its real estate holdings. Shelton complained this caused him emotional distress and other injuries.

c.) **Proceedings Below**

Seattle Stevedore moved for dismissal of the longshoremen's claim pursuant to Rule 12(b)(6) on the grounds that longshoremen's allegations of injuries stemming from bad faith violations of the LHWCA and breaches

of duties imposed by maritime common law did not state a claim upon which relief could be granted. Thereafter, Seattle Stevedore also asserted that the district court had no admiralty jurisdiction over the longshoremen's claim. The longshoremen responded to Seattle Stevedore's motion to dismiss and filed their own motions for summary judgment to establish that Seattle Stevedore had violated the LHWCA and maritime common law. The district court did not reach the issue of whether Seattle Stevedore had committed bad faith violations of the Act, as it held longshoremen had no cause of action for injuries stemming from bad faith violations of the LHWCA. The district court also held there was no admiralty jurisdiction under 28 U.S.C. Section 1333 of the longshoremen's claims against Seattle Stevedore and that the exclusivity and penalty provisions of the

LHWCA barred any action against Seattle Stevedore.

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court's holding that there was no jurisdiction of longshoremen's claims against Seattle Stevedore under 28 U.S.C. Section 1333 and that the exclusivity and penalty clauses barred these longshoremen's actions.

REASONS FOR ALLOWING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING THAT ADMIRALTY JURISDICTION DOES NOT AUTOMATICALLY ATTACH TO A CLAIM FOUNDED UPON VIOLATIONS OF THE LHWCA (A FEDERAL MARITIME STATUTE) IS CONTRARY TO THIS COURT'S DECISIONS IN ROMERO V. INTERNATIONAL TERM OPERATING CO., 358 U.S. 354 (1959), CROWELL V. BENSON, 285 U.S. 22 (1931), AND WASHINGTON V. W.C. DAWSON CO., 264 U.S. 219 (1924).

This petition raises the question whether admiralty jurisdiction attaches to a claim alleging the violation of a maritime

statute. The District Court, pursuant to a motion by the private defendants, held that there was no jurisdiction under 28 U.S.C. Section 1333 of the longshoremen's claims against Seattle Stevedore for alleged bad faith violations of the LHWCA. In affirming the district court's finding of no jurisdiction under 28 U.S.C. Section 1333, the Ninth Circuit Court of Appeals stated:

> That Congress created statutory obligations under the LHWCA, pursuant to its maritime powers, does not mean that admiralty jurisdiction automatically attaches where a claim is made under the statute.

These longshoremen believe that the Court of Appeals is wrong. Admiralty jurisdiction has always attached to actions brought to remedy violations of maritime law.

> "Every maritime nation has certain rules or laws in relation to ships, shipping, and maritime matters - rules peculiar to itself . . . . The admiralty

> court was the forum through which and by the aid of whose process, when necessary, these local municipal and administrative laws were enforced and their violators condemned in civil damages or criminally . . . . Cases arising under these laws are cases of traditional admiralty jurisdiction." 1 Benedict on Admiralty, Section 102, pp. 7-4 to 7-5 (1985).

In Romero v. International Term. Co., 358 U.S. 354 (1959), this Court faced the issue of whether a foreign seaman could obtain a jury trial by bringing a claim arising pursuant to the maritime common law under the District Court's general federal question jurisdiction. After analyzing the purposes of the jurisdictional grants enunciated in 28 U.S.C. Section 1333, and the predecessor of 28 U.S.C. Section 1331, this Court concluded that the two jurisdictional grants were mutually exclusive; i.e., that general federal question jurisdiction did not provide lower

courts with an alternative jurisdictional basis to decide legal issues which had previously been resolved pursuant to 28 U.S.C. Section 1333. Although the practical issue in that case was a plaintiff's right to a jury trial, the court's lengthy discussion of the purposes underlying both jurisdictional statutes makes clear that it intended to preserve the distinction between admiralty and general federal question jurisdiction so as to ensure that federal district courts sitting in admiralty would continue to "enforce the comprehensive federal interest in the law of the sea." Id. at 363.

Prior to this Ninth Circuit decision, it had always been generally assumed that unless Congress legislated otherwise, admiralty had jurisdiction over cases involving the interpretation and violation of maritime legislation. Id. at 371 ("in

the entire history of maritime legislation . . . Congress had not once let the availability of trial on the law side to inference"), and at 367, note 23 ("all actions based on substantive federal maritime law are cases arising under the court's admiralty jurisdiction pursuant to Art. 3, Section 2, cl. 1."). See, also, 1 Benedict on Admiralty Section 102, p. 7-5, (1985). Cf. Giacona v. Capricorn Shipping Co., 394 F.Supp. 1189, 1191 (1975) (indicating that a claim based on a violation of a maritime statute can be brought under either Section 1333 or 1331.)

The only authority cited by the Ninth Circuit for its bald assertion that admiralty jurisdiction does not automatically attach to a claim premised on the violation of a maritime statute is its own decision in Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984). That

case did not involve a maritime statute. Moreover, in that case, the Ninth Circuit specifically held that:

> "resolution of Myhran's [common law] tort claims does not require the special expertise of a court sitting in admiralty . . . nor is there any federal interest in uniformity of decision requiring the application of federal substantive law." Id. at 1122.

These observations are sufficient to distinguish Myhran from the instant situation. This court long ago held that the creation and operation of a compensation scheme for longshoremen was of such national concern that the task of operating such a system could not be delegated the states. Washington v. W.C. Dawson Co., supra. And in Crowell v. Benson, supra, at 49, this Court indicated that resolution of legal issues arising under that Act should be by a federal court sitting in admiralty.

Apparently, the Ninth Circuit was reluctant to find admiralty jurisdiction because it thought these longshoremen were attempting to collect punitive damages, which are sometimes allowed in admiralty. Op., p. 15 and 21, n 12. This was a mistaken impression.[1] But even if it were correct, that would not be an appropriate reason to withhold jurisdiction. The very purpose for the constitutional grant of admiralty jurisdiction is "to place the entire subject, including its substantive as well as its procedural features, under national control." Detroit Trust Co. v. Steamer "THOMAS BARLUM", 293 U.S. 21, 43

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[1] The thrust of these longshoremen's prayer to the district court was for compensatory damages for injuries not compensable under the LHWCA. Punitive damages were sought so as to deter similar conduct by other potential defendants in the future.

(1934). The fact that admiralty may have its own peculiar features, like punitive damages, to ensure compliance with its mandates is no reason to withhold admiralty jurisdiction. For certainly the district courts, sitting without a jury to "enforce the comprehensive federal interest in the law of the sea", Romero, 358 U.S., at 363, will be able to discern the appropriateness of applying this remedy.

II. THE NINTH CIRCUIT'S JUDGMENT THAT THE EXCLUSIVITY AND PENALTY PROVISIONS OF THE LHWCA BAR LONGSHOREMEN'S ACTIONS FOR DAMAGES CAUSED BY A SELF-INSURER'S BAD FAITH CONDUCT AFTER EMPLOYMENT HAS ENDED CONFLICTS WITH THE 1ST CIRCUIT'S DECISION IN MARTIN v. TRAVELERS INS. CO., 497 F.2D 329 (1ST CIR. 1974), AND IS INCONSISTENT WITH THIS COURT'S RECENT DECISIONS IN NORTHEAST MARINE TERMINAL CO. v. CAPUTO, 432 U.S. 249 (1977), P.C. PFEIFFER CO. v. FORD, 444 U.S. 69 (1979), AND HERB'S WELDING INC. v. GREY, 105 S.CT. 1421, ____U.S.____ (1985).

The instant decision of the Ninth Circuit conflicts with Martin v. Travelers

Ins. Co., 479 F.2d 329 (1st Cir. 1974). Op., p. 21 and 22. In Martin, the 1st Circuit held that the action of a longshoreman seeking to recover damages for injuries resulting from the bad faith handling of his compensation claim was not barred by the exclusivity, 33 U.S.C. Section 905(a), and penalty, 33 U.S.C. Section 914(e) and (f), provisions of the LHWCA because the Act did not apply to injuries occasioned after employment had ended. This reasoning is consistent with the general rule that exclusivity provisions bar claims for injuries covered by the compensation law only. 2(a) Larson Workmen's Compensation Law, Section 65.40, at 12-25 thru 12-32 (1985).

Recent decisions of this Court seem to indicate that these longshoremen's injuries, which stemmed from Seattle Stevedore's land based actions occurring after maritime

employment had terminated, lack the requisite, situs and status to be covered under the LHWCA. Herb's Welding, Inc. v. Gray, 105 S.Ct. 1421, 1427-1428 (1985); Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 74 (1979); Northwest Marine Terminal Co. v. Caputo, 432 U.S. 249, 265 and 279 (1977). If this is so, the Ninth Circuit decision leaves longshoremen without any real remedy under the LHWCA or the maritime common law for injuries occasioned as the result of an insurer's bad faith handling of a compensation claim.[2] Although the Ninth

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[2] Apparently, the one exception envisioned by the Ninth Circuit to exclusivity would be when an employer specifically intended to injure an employee. Op. 20 and 21. It is respectfully contended that this exception is too narrow under the

(Footnote Continued)

Circuit acknowledges that this appears inconsistent with this Court's prior beneficent treatment of longshoremen, see Op. 18, it rationalizes such a result under Justice Steven's Opinion in Mobile Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) by concluding that Congress enacted the Act's penalty, 33 U.S.C. Section 914(e) and (f), and attorney fees, 33 U.S.C. Section 928(a), provisions precisely for use against defendants like Seattle Stevedore, who act in bad faith. Op. 18 and 19. This is a

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(Footnote Continued)
LHWCA because in many instances it would leave longshoremen who have been injured by an insurer's bad faith without a remedy under the Act because of its situs and status requirements. The real test should be whether the insurer's conduct causing injury was so egregious that it could not meet the "naturally resulting" test of section 902(2)'s definition of injury. "The term 'injury' means accidental injury . . . and such occupational disease or infection as . . . naturally or unavoidably results from such injury." Id.

clear misreading of both the LHWCA provisions and Higginbotham. These LHWCA provisions apply to any employer who withholds payments, whether the withholding is in good faith or bad faith, and provide interest benefits to all claimants whether or not the withholding results in injury. Certainly, these provisions alone are not an indication that Congress intended longshoremen to have no remedy for substantial injuries caused by an insurance company's bad faith refusal to comply with the law. See, e.g., Stafford v. Westchester Fire Ins. Co., 526 P.2d 37 (1974).[3]

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[3] In Stafford, the Alaska Supreme Court interpreted an identical penalty provision taken by the Alaska legislature from the LHWCA. In response to the argument that these penalty provisions were supposed to be the exclusive remedy for an insurer's tortious behavior in the handling of compensation claims, the Court stated: "We

(Footnote Continued)

As it stands now in the Ninth Circuit, unless the situs and status requirements of the Act are exempted in cases like these, longshoremen will be unable to secure any remedy for injuries, no matter how substantial, occasioned as the result of an insurer's bad faith refusal to provide medical benefits or pay compensation. This insulation from liability (no matter how egregious the bad faith) coupled with the systemic delays in the LHWCA adjudication process will allow insurers an unregulated life or death power over longshoremen, who when within admiralty's reach have been the

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(Footnote Continued)
believe that AS 23.30.155 was envisioned by Alaska's legislature to cover situations where the employer negligently, or willfully, failed to make timely compensation payments, but that this section was not intended to operate as the exclusive remedy for all intentional wrongdoings. See, also, Martin v. Travelers Ins. Co., supra.

traditional wards of this Court. See, e.g., American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284-285 (1980); Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 180-182 (1946).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 23, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

WILLIAM SAMPLE and KAREN SAMPLE, husband and wife, and JAMES SHELTON,
Plaintiffs-Appellants/ Cross-Appellees,

v.

REGINALD JOHNSON, Deputy Commissioner for the Office of Worker Compensation Program for District 14, et al.,
Defendants-Appellees/ Cross-Appellants.

Nos. 84-4134, 84-4240

D.C. No. CV 83-1060R

OPINION

Argued and Submitted
August 8, 1985—Seattle, Washington

Filed September 20, 1985

Before: Harry Pregerson and Charles Wiggins, Circuit Judges, and Robert H. Schnacke,* District Judge.

Opinion by Judge Wiggins

Appeal from the United States District Court
for the Western District of Washington
Barbara Rothstein, District Judge, Presiding

*Hon. Robert H. Schnacke, United States District Court for the Northern District of California, sitting by designation.

SUMMARY

Admiralty/Labor

Appeal by two longshoremen of a district court judgment that the government may take up to six months to conduct Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, claim hearings and that the government is not compelled to reject an LHWCA claim or make an award within 20 days after notice of no hearing is held, and that there is no admiralty jurisdiction for intentionally wrongful controversions of LHWCA claims; and cross-appeal by government of district court's refusal to dismiss the claims against the government as moot. Affirmed in part and reversed in part.

Both plaintiffs were injured in 1982; plaintiff Sample on April 26 and plaintiff Shelton on March 28. Sample received compensation from his employer from April 8 to June 1, 1983. His claim was controverted June 15, 1983 and a hearing was held before an administrative law judge (ALJ) March 14, 1984. He received an award of LHWCA compensation April 23, 1984, but was without income for more than ten months. Shelton received compensation from the employer from April 27, 1982, but requested a hearing concerning the level of compensation January 28, 1983. The employer controverted the claim and stopped payment on May 20, 1983. A hearing was held on October 27, 1983 and he was awarded permanent partial disability February 15, 1984, with nine months having elapsed between controversion and award during which he was without income. The district court denied the government's request for dismissal of the action as moot on the basis that the plaintiffs are receiving award payments, ruled that the government has up to six months after controversion to award benefits, that the ALJ must rule on a LHWCA within 20 days of a hearing, but that the Deputy Commissioner of Labor need not reject a claim or make an award within 20 days of employer notice in cases where no hearing is held.

[1] An exception to the general rule that a court's decision will not apply without a case or controversy exists where an injury is

"capable of repetition, yet evading review," [2] but the practices to which appellants object must be capable of repetition as to them. Where no class action is instituted, the capable of repetition doctrine is applied only in exceptional situations where the plaintiff can reasonably show that he will again be subject to the same injury. [3] The likelihood of the injury recurring must be calculable and if there is no basis for predicting that any future repetition would affect the present plaintiffs, there is no case or controversy.

[4] Plaintiffs must show a likelihood that they will be affected again by that which they challenge [5] and this burden cannot be met by a merely subjective showing. [6] Here, the district court simply noted that one of the plaintiffs, Sample, had returned to work in a hazardous occupation, and that level of generality is insufficient to establish that serious injury will probably recur to Sample, so the court should have dismissed the claims against the government as moot.

[7] The district court's conclusion that admiralty jurisdiction was lacking because the intentional violations did not occur over water and were unconnected with traditional maritime activities is reviewed *de novo* and upheld. [8] The intentional harm claim here involves little more than the state law tort of intentional infliction of emotional distress and is not an admiralty claim at all.

[9] The LHWCA's exclusivity of remedies provision provides that the liability of an employer shall be exclusive and in place of all other liability of such employer. [10] Even if this provision is not read to bar the putative cause of action for wrongful refusal to pay sought by the plaintiffs, the LHWCA penalty provision should serve the same purpose. If the penalty provisions are inadequate to fully compensate a worker who has been harmed by an employer's refusal to pay when due, the problem requires a political solution.

COUNSEL

Scott E. Stafne and Stewart Jay, Seattle, Washington, for the plaintiffs-appellants.

Richard K. Willard, Assistant Attorney General, Gene S. Anderson, United States Attorney, John F. Cordes and Mark W. Pennak, Department of Justice, Washington, D.C. for the defendants-appellees; Williams, Lanza, Kastner & Gibbs and Richard M. Slagle, Seattle, Washington, for Seattle Stevedore Co., etc.

OPINION

WIGGINS, Circuit Judge:

William Sample and James Shelton are longshoremen who seek to overturn the judgment of the district court that the government may take up to six months to conduct Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[1] claim hearings and that § 919(c)[2] does not compel the government to reject an LHCWA claim or make an award within 20 days after notice if no hearing is held. They also seek a reversal of the judg-

[1]33 U.S.C. § 901, *et seq.*

[2]That provision reads:

> The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

ment below ruling that there is no admiralty jurisdiction for their claims against their employer and other "private" defendants and no general maritime law remedy for intentionally wrongful controversions of LHWCA claims. The government argues that since Sample and Shelton have been compensated, their claims are moot. We conclude that the district court erred in refusing to dismiss the claims against the government as moot but we affirm the dismissal of the claims against the employer.

FACTS

The facts are not disputed. Sample was injured on April 26, 1982; Shelton was injured on March 28, 1982. Sample received compensation from Seattle Stevedore from April 8 to June 1, 1983. The employer controverted his claim on June 15, 1983 and a hearing was held before an ALJ on March 14, 1984. On April 23, 1984, Sample received an award of LHWCA compensation pursuant to an order of the district court. Sample was without income during the more than ten months between the controversion and the award.

Shelton received compensation from the employer from April 27, 1982, but requested a hearing concerning the level of compensation on January 28, 1983. The employer controverted the claim and stopped payment on May 20, 1983. A hearing was held on October 27, 1983 and Shelton was awarded permanent partial disability on February 15, 1984. Almost nine months elapsed between controversion and award during which Shelton was without income.

In its first order, dated April 6, 1984, the district court granted summary judgment for Sample as to his claim that an ALJ must rule on a LHWCA claim within twenty days of a hearing (ER 32). In its second order, dated July 27, 1984, the district court denied the government's request for dismissal of the action as moot. It ruled that benefits must be awarded to a claimant, if at all, within six months of controversion. The trial court also held that since the third sentence of section 919(c) is directory and not mandatory, the Deputy Commissioner of Labor need not reject

the claim or make an award within twenty days of employer notice of the claim in cases where no hearing is held. In its third order, dated August 13, 1984, the court granted the private defendants' motion to dismiss all claims against them because the claims were not cognizable in admiralty, there is no private cause of action for violations of the LHWCA and the claims were barred by 33 U.S.C. § 905(a), the LHWCA exclusivity of remedies provision.[3]

MOOTNESS

A moot action is one where the issues are no longer live or the parties lack a legally cognizable interest in the outcome. *Lee v. Schmidt-Wenzel and Harter,* No. 84-5945, slip op. at 5 (9th Cir. July 26, 1985). Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. *Iron Arrow Honor Society v. Heckler,* 104 S.Ct. 373, 376 (1983). We apply a *de novo* standard for reviewing a district court's decision on subject matter jurisdiction, see *Fort Vancouver Plywood Co. v. United States,* 747 F.2d 547, 549 (9th Cir. 1984) and, concomitantly apply that standard in reviewing questions of mootness.

Since hearings have been held for and awards made to Sample and Shelton, their declaratory and injunctive claims subsist only if this case involves claims that are capable of repetition with respect to those individuals. The government contends that because appellants have not shown that it is likely they will again be injured and make claims, the case against it is moot. Appellants retort that since the district court found that Sample had resumed working in the hazardous occupation of longshoreman, they continue to present viable claims against the government.

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[3]Section 905(a) states in pertinent part that

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee [except] if an employer fails to secure payment of compensation as required by this chapter, an injured employee ... may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death.

[1] The Supreme Court early-on fashioned an exception to the general rule that where a court's decision will no longer have an impact on plaintiff, there is no case or controversy. In *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U.S. 498 (1911), the Court permitted review of an administrative order that prohibited for two years the continuing of a private agreement, even though the two years had expired. The Court recognized that questions involved in ICC proceedings are frequently repetitive, but that the agency's order are often of short duration. Review could be had where there was injury that was "capable of repetition, yet evading review." *Id.* at 515.[4]

The questions presented by appellants' claims against the government evade review. They concern twenty-day and six-month time-limits. There could never be a full adjudication that would inure to the benefit of a longshoreman who brought a similar challenge. In *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 186 n.9 (1982), where it was claimed that an individualized educational program (IEP) for a handicapped child for the school year 1978-79 was inadequate, the Supreme Court noted that "Judicial review invariably takes more than nine months to complete, not to mention the time consumed during preceding state administrative hearings." It held that the IEP's shortcomings were capable of repetition as to the parties before it, yet evaded review. *See also California Energy Resources Conservation and Development Commission v. Bonneville Power Administration,* 754 F.2d 1470, 1473 (9th Cir. 1985) ("short-term transactions . . . can evade review in the sense that they can be completed in a shorter time than that required by the parties and this court to file, brief, argue, and decide a case").

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[4]The oft-cited doctrinal formula is found in *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (per curiam), where it was held that an injury is capable of repetition, yet evades review if: (1) the challenged action was of limited duration, too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. This formulation is of relevance only in the absence of a class-action suit. *See Planned Parent. of C. & N. Ariz. v. State of Ariz.,* 718 F.2d 938, 949 (9th Cir. 1983). Neither this case nor those discussed below involved class action.

[2] The question then is whether the practices to which appellants object are capable of repetition *as to them.* Where no class action has been instituted, the capable of repetition doctrine is applied only in exceptional situations where the plaintiff can reasonably show that *he* will again be subject to the same injury. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 108 (1983) (unlikely that plaintiff will again be subject to police chokehold). That other persons may litigate a similar claim does not save a case from mootness. *Lane v. Williams,* 455 U.S. 624, 634 (1982) (question whether defendant must be informed that guilty plea yields mandatory parole term is moot where sentence already served; petitioner now knows consequences of plea).

This rule is but a reflection of the Article III requirements of direct injury and a "personal stake" in the outcome. *See Warth v. Seldin,* 422 U.S. 490, 498 (1975); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3531.12 at 60 (1984). Cases construing the "capable of repetition" rule are thus similar to standing cases. *See United States Parole Commission v. Geraghty,* 455 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)").[5]

There has been scant analysis of what must be shown to establish that a plaintiff will likely be injured again. The Supreme Court has stated that plaintiffs must demonstrate that a "credible threat" exists that they will again be subject to the specific injury for which they seek injunctive or declaratory relief. *Kolender v. Lawson,* 461 U.S. 352, 355 n.3 (1983). A "reasonable showing" of a "sufficient likelihood" that plaintiff will be injured again is necessary. *City of Los Angeles v. Lyons,* 461 U.S. at 108, 111.

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[5]Examples include *Rizzo v. Goode,* 423 U.S. 362 (1976) (no more than hypothetical possibility that plaintiffs' individual rights would be violated by unconstitutional police action in future) and *O'Shea v. Littleton,* 414 U.S. 488 (1974) (discriminatory bail, sentencing and costs practices challenged; no standing because possibility that plaintiffs would later violate law too remote). These cases require that a plaintiff establish his "personal stake" in injunctive relief by making "an essential showing of the likelihood of similar injury in the future." *LaDuke v. Nelson,* 762 F.2d 1318, 1324 (9th Cir. 1985).

The "mere physical or theoretical possibility" of a challenged action again affecting a plaintiff is not sufficient. *Murphy v. Hunt,* 455 U.S. 478, 482 (1982) (not probable that conviction of one who attacked state's denial of bail for accused sex offenders will be overturned and he will again seek pre-trial bail). There must be a "demonstrated probability" that plaintiff will again be among those injured. *Weinstein v. Bradford,* 423 U.S. at 149 (not shown that former prisoner probably would be among those deprived of parole procedures that he had sought).

[3] The likelihood of the injury recurring must be calculable and if there is no basis for predicting that any future repetition would affect the present plaintiffs, there is no case or controversy. *Preiser v. Newkirk,* 422 U.S. 395, 402-403 (1975) (prisoner's challenge to transfer from medium to maximum security prison moot because of re-transfer to medium security; any fear of returning to maximum security "remote and speculative"); *Wiggins v. Rushen,* 760 F.2d 1009, 1011 (9th Cir. 1985) (possibility of being sent to maximum security unit "too speculative to rise to the level of reasonable expectation or demonstrated probability"); *SEC v. Medical Committee for Human Rights,* 404 U.S. 403, 406 (1972) (whether shareholders will again submit proposed corporate charter amendment to ban making of napalm too speculative to prevent mootness).

In some cases, it is virtually certain that the plaintiff would never again be affected by the practice that he challenged. *See, for example, DeFunis v. Odegaard,* 416 U.S. 312, 318-319 (1974) (certain that plaintiff, who challenged admission policies of law school to which he was ordered admitted and from which he graduated, would never go through law school again); *Hall v. Beals,* 396 U.S. 45, 49 (1969) (almost no chance that franchise residency statute that affected plaintiffs in 1968 election would also affect them in 1972); *Trustees for Alaska v. E.P.A.,* 749 F.2d 549, 556 (9th Cir. 1984) (intervening change in legal standard moots claim of those challenging expired pollution discharge permits); *Wilson v. State of Nev.,* 666 F.2d 378, 381 (9th Cir. 1982) (disparate impact challenge to state high school diploma job requirement mooted by plaintiff's earning diploma);

Clancey v. Albert, 600 F.2d 237, 238 (9th Cir. 1979) (possibility too remote that constituent challenging bar against convicted and defeated Congressman voting until vindicated or reelected would again live in district with a criminal Congressman), *cert. denied,* 444 U.S. 916 (1979); *Friends of the Earth, Inc. v. Bergland,* 576 F.2d 1377, 1379 (9th Cir. 1978) (defendant will not repeat exploration which plaintiffs sought to enjoin); *Chrisman v. Sisters of St. Joseph of Peace,* 506 F.2d 308 (9th Cir. 1974) (woman who sought hospital sterilization sterilized elsewhere).

Other cases evince a strong probability that plaintiff might be affected more than once by the questioned practice. *See, Kolender v. Lawson,* 461 U.S. at 355 n.3 (plaintiff stopped 15 times in two years pursuant to ordinance requiring identification by those who wander the streets); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982) (assume major newspaper opposing statute banning press from trials involving sex offenses will again be subject to statute's strictures); *Gannet Co. v. DePasquale,* 443 U.S. 368, 377-78 (1979) (expect major newspaper publishing company will again be affected by judicial refusal to open trial to press or provide transcript); *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 109 n.5 (1978) (action against suspension of trading of stock not moot although no current suspension because SEC considers company chronic violator); *First National Bank of Boston v. Belloti,* 435 U.S. 765, 775 (1978) (challenge to statute prohibiting expenditures by banks for referenda not moot, despite particular referendum's defeat, since it had been on the ballot four times before); *United States v. New York Telephone Co.,* 434 U.S. 159, 165 n.6 (1977) (plain that telephone company will be subject to government orders to install pen registers in future); *Nebraska Press Ass'n. v. Stuart,* 427 U.S. 539, 547 (1976) (order prohibiting entire press from reporting on confessions during "sensational" trial); *In re Grand Jury Proceedings Klayman,* 760 F.2d 1490, 1492 (9th Cir. 1985) (government will again call attorney to testify before new grand jury; attorney will again refuse to answer question); *United States v. State of Or.,* 657 F.2d 1009, 1012 (9th Cir. 1981) (salmon fishing season over but Indians will want to fish next year and similar injunction will issue): *Thirteenth*

Guam Legislature v. Bordallo, 588 F.2d 265, 266 (9th Cir. 1978) (per curiam) (legislative session over but governor intends to use item veto in future sessions).

Many cases fall in between these two poles. In some instances, the action for declaratory or injunctive relief remained viable. *See Carroll v. President & Commissioners of Princess Anne,* 393 U.S. 175, 179 (1968) (racists whose speeches restricted by county ordinance may again seek permit for rally); *Johansen v. San Diego County District Council,* 745 F.2d 1289, 1293 (9th Cir. 1984) (unions and contractors will continue to have labor disputes and NLRB will likely continue to request short-term picketing injunctions); *N.A.A.C.P. Western Region v. City of Richmond,* 743 F.2d 1346, 1353 (9th Cir. 1984) (Richmond police had killed five black men in three years, NAACP has interest in protest and no reason to believe that Richmond will refrain from enforcing the parade ordinance in the future); *Tyars v. Finner,* 709 F.2d 1274, 1280 (9th Cir. 1983) ("definite likelihood" that plaintiff would again be involuntarily committed under challenged procedures because he was committed twice since first raising challenge); *Doe v. Gallinot,* 657 F.2d 1017, 1021 n.6 (9th Cir. 1981) (same; confined six times after complained-of commitment).

In other instances, there was "very little chance, much less a reasonable expectation" that a plaintiff would again be subjected to the act of which he complains. *Luckie v. E.P.A.,* 752 F.2d 454, 458 (9th Cir. 1985) (for recurrence, residents would have to relocate atop another asbestos dump and again be subject to EPA regulatory scheme). *See also Lee v. Schmidt-Wenzel and Harter,* slip op. at 7 (because vacancies on board of directors of bank now filled, "extremely unlikely" that dispute over whether vacancies must be filled by a majority of full board or could be filled by majority of quorum present at meeting would arise again); *Walker v. Huston,* 689 F.2d 901, 903 (9th Cir. 1982) (release moots challenge to statute making rape offense nonbailable on appeal; no reasonable expectation that petitioner would again be convicted of rape and denied bail); *California Hospital Ass'n v. Obledo,* 602 F.2d 1357, 1359 n.2 (9th Cir. 1979) (unlikely that

state will issue another order freezing interim hospital reimbursement payments); *United States v. State of Washington, Department of Fisheries*, 573 F.2d 1118, 1120 (9th Cir. 1978) (unlikely that now-rescinded regulations covering Indian fishing rights will be reissued; issuing agency no longer has jurisdiction over Indians); *Williams v. Alioto*, 549 F.2d 136, 144 (9th Cir. 1977) (since murders solved, no cognizable danger or reasonable expectation that policy of detaining black males in connection with "Zebra" killings would recur); *Wilson v. Webster*, 467 F.2d 1282, 1283 (9th Cir. 1972) (improbability of further campus uprisings moots challenge to related ordinance); *Halvonik v. Reagan*, 457 F.2d 311, 313-14 (9th Cir. 1972) (unlikelihood of future riots moots challenge to California loitering and assembly regulations).[6]

[4] There are a few generalizations that might be extracted from the cases concerning capability of repetition. The principal tendency to emerge is the necessity for plaintiffs to show a likelihood that *they* will be affected again by that which they challenge. A decade ago, when there had as yet been little development of the case law, commentators could argue with some authority that judicial economy or the importance of the

[6]Several cases have simply ignored the necessity of determining whether there will likely be a repetition of the injury in question. *See, for example, Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974) (strike over but action against strikers receiving welfare not moot because state policy is fixed; no discussion of probability of another strike against plaintiff-employer); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (attack on abortion laws not moot despite plaintiff no longer being pregnant and giving no indication that she will again become pregnant and seek abortion); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (even though plaintiff now eligible to vote, challenge to durational residency requirement allowed because others still affected); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (election over but challenge to nominating petition procedure will proceed because of "continuing controversy in the federal-state area"); *Allen v. Monger*, 583 F.2d 438, 440 (9th Cir. 1978) (action by now-discharged sailors who served aboard now moth-balled ship to enjoin regulation prohibiting petitioning of Congressmen not moot because "serious questions raised"), *vacated*, 444 U.S. 1063 (1980); *Webster v. Mesa*, 521 F.2d 442, 443 (9th Cir. 1975) (action against law prohibiting voter who has signed partisan candidate's petition from also signing independent's petition for same office not moot despite end of petitioning period).

question presented may outweigh the need for showing anything more than the "mere possibility" that plaintiff had a continuing personal stake in securing injunctive or declaratory relief. *See* D. Kates, W. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory,* 62 Cal. L.Rev. 1385, 1418-1425 (1974); Note, *The Mootness Doctrine in the Supreme Court,* 88 Harv. L.Rev. 373, 388 (1974). Cases such as *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), and *LaDuke v. Nelson,* 762 F.2d 1318 (9th Cir. 1985), make it clear that, no matter how important the issue or how likely that a similar action will be brought, a court is without jurisdiction if there is not a sufficient likelihood of recurrence with respect to the party now before it.

[5] Another tendency that emerges is that of placing the burden for showing a likelihood of recurrence firmly on the plaintiff. For example, in *United States v. W.T. Grant,* 345 U.S. 629, 633 (1953), the Court held that an injunction case was not moot simply because the defendant had ceased the challenged practice unless *the defendant* could show that there was "no reasonable expectation" that the practice would be resumed. Thirty years later, *Lyons* is replete with statements emphasizing that it is *plaintiff's* burden to show the likelihood of recurrence. 461 U.S. at 101-102 ("[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct"; 461 U.S. at 109 ("the named plaintiff [must] make a reasonable showing that he will again be subjected to the alleged illegality"). *See also Lee v. Schmidt-Wenzel and Harter,* slip op. at 7 ("the plaintiffs have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity") (citation omitted). A plaintiff's burden can not be met with a merely subjective showing. *Id.* ("Speculative contingencies afford no basis for finding the existence of a continuing controversy between the litigants as required by article III"). An attestation of plaintiff's fear that the injury might recur will not suffice to demonstrate the capability of repetition of an injury. *See Preiser v. Newkirk,* 422 U.S. at 402-403. Whether the standard is that of a "credible threat", a "reasonable showing" of a "sufficient likelihood", or a "demonstrated probability", the "essential

showing" is objective, i.e. directly or inferentially statistical. *See* D. Barnes, *Statistics as Proof: fundamentals of quantitative analysis* 31-35 (1983) (statistical inferences). The subject matter involved will facilitate precise prognostication in some cases and hamper it in others, as the categorization of cases illustrates. However, there are many instances in which prediction, while not simple, is quite possible. For example, in *Johansen v. San Diego County District Council,* 745 F.2d 1289 (9th Cir. 1984), the union presumably could have offered statistics on the frequency of its engaging in secondary picketing, in order to show that it was likely that it would again picket and the NLRB would again seek a short-term injunction.

The instant matter is the paradigmatic case for a statistical showing of likely recurrent injury. Here, the predicate to a claim is a physical injury. There are few occurences that are more assiduously recorded than physical injuries. Without such records, of course, no actuarial table could be constructed and insurance rates could not be fixed. There are many likely sources for establishing the probability that a longshoreman will be seriously injured, including insurance carriers, the Department of Labor and both the employers and unions. With such statistics, a prediction could be made as to whether one with the same work-life expectancy as Sample is likely to experience another claimable injury.

The cases have also not indicated what *degree* of probability is required where a plaintiff can show a likely recurrence of injury. Query whether the test should be one of more likely than not, i.e. in instances reducible to percentages, more than fifty-fifty, or whether the test should be one where probability, in the strict sense, is not required, but merely some significant possibility. The language found in the cases discussed above, particularly in *Weinstein* ("demonstrated probability"), militates in favor of a "more likely than not" standard.[7] However, because the concep-

[7]The only federal court to define the term "probable" conceived of it as "more than 50 percent of actual." *Price v. Neyland,* 320 F.2d 674, 678 (D.C. Cir. 1963).

tions of probability that have arisen in jurisprudence and in other branches of learning have far from achieved a perfect congruence, see D. Kaye, *Statistical Significance and the Burden of Persuasion*, 46 Law & Contemp. Probs. 13 (1983), we prefer to describe "probability" qualitatively, as requiring a very significant possibility, and not quantitatively, as mandating a "greater than fifty percent" likelihood. *See* M. Victor, *Using Decision Analysis to Assist Litigation Strategy*, 40 Bus. Law. 617, 625-26 (1985) (qualitative v. quantitative descriptions of probability).

[6] The district court here simply noted that Sample had returned to work in a hazardous occupation. That level of generality is insufficient to establish that serious injury will probably recur to Sample. Plaintiffs failed to meet their burden of demonstrating the probability of recurrence. Accordingly, the district court should have dismissed the claims against the government as moot.

ADMIRALTY JURISDICTION

[7] Hoping to recover punitive damages, appellants alleged that bad faith actions by the private defendants caused them injuries apart from those covered by the LHWCA. They claimed that the private defendants controverted their claims despite knowledge that the workers were entitled to compensation. Defendants successfully moved to dismiss pursuant to 28 U.S.C. 12(b)(6). The district court held that admiralty jurisdiction, 28 U.S.C. § 1333, was wanting because the intentional violations did not occur over water and were unconnected with traditional maritime activities. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253, 268 (1972). Questions of jurisdiction are reviewed *de novo*. *Fort Vancouver Plywood Co.*, 747 F.2d at 549.

Appellants admit that the failure to pay benefits prior to a compensation hearing occurred on land and that the wrongful controversion bore no relationship to a traditional maritime activity. They nevertheless argue that the *Executive Jet* test is inapplicable because it does not restrict admiralty jurisdiction when the claim is founded upon a maritime statute, the

LHWCA, citing *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983).

Neither that case, nor others cited by appellants, involved the use of admiralty jurisdiction coupled with an LHCWA claim. *Perini* decided that a construction worker, injured while performing his craft for a construction company on a river barge used for the construction of a sewage treatment plant, was engaged in maritime employment and could, therefore, make an LHWCA claim.[8] The other cases cited do not involve the LHWCA.

That Congress created statutory obligations under the LHWCA, pursuant to its maritime powers, does not mean that admiralty jurisdiction automatically attaches where a claim is made under the statute. *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984) is instructive in that regard. There, a pipefitter was injured by asbestos while repairing and renovating vessels on navigable waters. He filed a products liability action against the manufacturers of asbestos products. Judge Hug noted that the Supreme Court's understanding of the history of admiralty jurisdiction

> suggests that admiralty law is not concerned with tort claims such as those of Myhran. None of the issues listed by the Supreme Court in *Executive Jet* are involved in Myhran's suit. Rather, as the Eleventh Circuit observed in a case factually similar to this case, 'the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local

[8]Appellants also rely upon *Crowell v. Benson*, 285 U.S. 22 (1932), for the notion that a court that treats an LHWCA claim is exercising its admiralty jurisdiction. In that case, Chief Justice Hughes mentions that claims subject to the LHWCA are "governed by the maritime law as established by the Congress and are within the admiralty jurisdiction," but only in the context of discussing whether they implicated a right to trial by jury. *Id.* at 45. Nothing in that case indicates that an injury giving rise to an LHWCA claim carries the general admiralty law in its wake.

resolution. *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 786 (11th Cir. 1984). Resolution of Myhran's tort claims does not require the special expertise of a court in admiralty as to navigation or water-based commerce, nor is there any federal interest in uniformity of decision requiring the application of federal substantive law (citation omitted).

[8] The district court was thus correct in viewing the intentional harm claim as involving little more than the state law tort of intentional infliction of emotional distress and not an admiralty claim at all.

THE COMMON LAW AND STATUTORY EXCLUSIVITY OF REMEDY

The district court, citing *Cort v. Ash*, 422 U.S. 66 (1975), held that an injured longshoreman had no "private right of action" to sue for damages in excess of those prescribed by the LHWCA where the alleged damages were related to section 907 and 908 of the Act.[9] Appellants assert that in contrast to the claims dealt with in *Cort* (a stockholder's derivative suit against officials who had violated federal election laws by expending their corporation's funds for advertising in the 1973 Presidential elections), they have sued the private defendants under a body of federal common law where federal courts are permitted to create remedies, i.e. maritime law.

The private defendants answer that there is no federal common law. This is, of course, inaccurate. There may be "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), but federal common law exists where a federal rule of decision is "necessary to protect uniquely federal interests", *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) or where Congress has given the courts power to develop substan-

[9]The former provision covers the employer's responsibility for furnishing the injured worker with medical services and supplies, while the latter provision covers compensation for disability.

tive law. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). *See also* Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969). The general maritime law is probably the most ancient body of federal common law. *See Edmonds v. Compagnie Generale Transatlantique.*, 443 U.S. 256, 259 (1978). It has been specifically held that general federal maritime law is a source of relief for a longshoreman's personal injury. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412-414 (1953).

Supreme Court cases provide several examples of the creation of remedies under general maritime law for nonpecuniary damages that supplement federal maritime statutory remedies. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), a longshoreman's widow sued for the wrongful death of her husband. She joined claims of negligence and unseaworthiness under the general maritime law. The Court held that a common law cause of action for wrongful death lies, even though federal statutes have sought to create a uniform remedy for negligently-caused deaths, because additional, nonstatutory federal remedies would create uniformity by substituting for the patch-work of state wrongful death laws. 398 U.S. at 400-401. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974), the Court, in allowing for suit by the widow of a longshoreman who had recovered damages for his injuries prior to work-related death, stated that *Moragne* created a wrongful-death remedy independent of any action that the decedent during his lifetime may have had for his own personal injuries. Finally, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283 (1980), the Court held that the wife of a harbor worker injured aboard a ship on state territorial waters could maintain a general maritime action for damages for the loss of her husband's society.

While all of these cases implicated longshoremen or harbor workers, none of these cases involved an action under the LHWCA. Moreover, other cases have not shown a similar readiness to create general maritime nonpecuniary damage remedies. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Court construed the Death on the High Seas Act (DOHSA), 46 U.S.C. § 762, as forbidding general maritime law supplementa-

tion of the elements of compensation provided for by that Act. DOHSA expressly limits a decedent's survivors' recovery to their "pecuniary loss' and hence additional damages for nonpecuniary losses could not be had. Distinguishing *Moragne* and *Gaudet*, Justice Stevens stated that "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* at 625; *see also Beltia v. Sidney Torres Marine Transport, Inc.*, 701 F.2d 491 (5th Cir. 1983) (suits for loss of society based upon negligence not maintainable because Jones Act does not permit supplemental recovery for that injury, but such recovery possible where general maritime claim for unseaworthiness is also brought).

While Congress did not expressly preclude the creation of a common law remedy for wrongful contravention, the remedies that it has made available for use against employers who act in bad faith bear on the question of whether federal courts ought to create the general maritime law remedy sought here. As the Court noted in *Moragne*, 398 U.S. at 407, the LHWCA's

> principles of recovery are wholly foreign to those of general maritime law—like most workmen's compensation laws, it deals only with the responsibilities of employers for death or injury to their employees, and provides standardized amounts of compensation regardless of fault on the part of the employer.'[10]

[9] The LHWCA's exclusivity of remedies provision, 33 U.S.C. § 905(a), states that "The liability of an employer prescribed in [this title] shall be exclusive and in place of all other liability of such employer." LHWCA liability occurs for "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Thus, the employer is not liable under the

[10] *Moragne* was, of course, handed down before the 1972 amendments to the LHWCA. However, these amendments were chiefly for the purpose of *strengthening* the exclusivity of LHWCA remedies. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-262 (1977); S.Rep. No. 1125, 92d Cong., 2d Sess. 4 (1972).

LHWCA for intentional injuries that it causes and section 905(a) is not applicable to claims concerning such injuries. However, the term "intentional" is construed very strictly where a workers' compensation statute exists. As Professor Larson, 2A Larson *Workmen's Compensation Law* § 68.13 at 13-8—13-9 (1984), explains

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.

A number of district courts have applied this principle in LHWCA cases. *See Houston v. Bechtel Assoc. Professional Corp.*, 522 F.Supp. 1094, 1096 (D.D.C. 1981) ("Nothing short of specific intent to injure the employee falls outside the scope of § 905(a). Absent such specific intent, the employee is foreclosed from maintaining a tort action against his employer") and cases cited therein.[11] The employee must, of course claim that the employer deliberately intended to injure him. *Austin v. Johns-Manville Sales Corp.*, 508 F.Supp. 313, 317 (D.Me. 1981). The courts have adhered to this rule because they recognize, as did congress when amending the LHWCA in 1972, that the LHWCA "operates like ordinary workmen's compensation and operates on a percentage of the earnings of an individual rather than reimbursing him for his actual injury, and puts a lid on his recovery." 118 Cong. Rec. 36383 (1972) (remarks of Rep. Eckhardt). However, the courts also recognize that without such

[11] Among these cases is an LHWCA matter in which Judge Orrick noted that "Under workers' compensation statutes, the exclusive liability protection afforded to the employer cannot be pierced if the employee's injury is caused by the employer's negligence, or any other misconduct short of genuine intentional injury." *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 95 (N.D. Cal. 1978) (footnotes omitted).

a rule, punitive damages might be awarded for insufficiently egregious acts. *See Houston,* 522 F.Supp. at 1097 (for punitive damages, tort must be aggravated by evil motive, actual malice, deliberate violence or oppression).[12] Here, the complaint does not allege that plaintiffs suffered severe emotional distress or that it was inflicted intentionally, let alone with actual malice. *See* ER 5-7.

Professor Larson has considered the attempts in worker's compensation cases to create a cause of action for intentional injury by an employer who has delayed or terminated payment or treatment. *See* 2A Larson *Workmen's Compensation Law* § 68.34(c) (1984). He has concluded that

> The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.

Id. at 13-76.

One such case, in which the employer's conduct was "conspicuously contemptible" was *Martin v. Travelers Ins. Co.,* 497 F.2d 329 (1st Cir. 1974). Plaintiff had received LHWCA compensation in the form of three drafts, which he deposited and drew upon. The defendant insurance company, deciding to appeal, stopped payments on the draft, causing plaintiff financial hardship and emotional distress. Reversing the district court's dismissal, Judge Coffin, in an opinion free of citation to authority, concluded that where a carrier deliberately stops payments

[12]Punitive damages are awardable, in some circumstances, to a seaman where payment for maintenance and cure is wrongfully denied. *See Tullos v. Resource Drilling, Inc.,* 750 F.2d 380, 388 (5th Cir. 1985). However, the very existence of separate acts for seamen and longshoremen—the Jones Act and the LHWCA, respectively—suggest that the two categories of workers are not to be assimilated in all respects.

already made, when it should have known that acute harm might follow, the exclusivity provision and the fact that the LHWCA contains a penalty for late payment do not bar an action.

In any event, cases involving ordinary refusal to pay are *contra*. The bulk of authority in cases involving ordinary refusals to pay is *contra*. One reason is that most worker's compensation statutes, like the LHWCA,[13] have penalty provisions for wrongful failure to pay. *See* Annot., 8 ALR 4th902, 904 (1984). In states where no such penalty provision exists, there are often explicit provisions stating that nonstatutory remedies are not barred when there is a refusal to pay. *See, for example, Hollman v. Liberty Mut. Ins. Co.*, 712 F.2d 1259, 1261 (8th Cir. 1983) (South Dakota).

[10] In this case, Shelton was awarded almost $6,300 in attorney's fees and prejudgment interest and received compensation for the "mental health sequelae" that flowed from his physical injury. Even if the exclusivity provision of the LHWCA is not read to bar the putative cause of action for wrongful refusal to pay, the penalty provision should serve the same purpose. While it may be that the penalty provisions are inadequate to fully compensate a worker who has been harmed by an employer's refusal to pay when due, the problem requires a political solution. *Goetz v. Aetna Cas. and Sur. Co.*, 710 F.2d 561, 564 (9th Cir. 1983).

CONCLUSION

The claims against the government are moot. The district court correctly dismissed the claims against the private defendants.

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[13]Sections 914(e) and (f) increase the amount of compensation due by ten or twenty percent for overdue installment payments payable without or with an award respectively; section 928 allows for attorney's fees if the employer declines to pay compensation and an award is subsequently made and section 907(d) allows for recovery for medical expenses when the employer refuses to furnish them. *See also* Ann., 49 ALR Fed. 425 (1984).

AFFIRMED IN PART and REVERSED IN PART.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM SAMPLE and KAREN SAMPLE, husband and wife, and JAMES SHELTON,	)	NO. C83-1060R
Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION FOR DISMISSAL OF WRONGFUL CONTROVERSION CLAIMS AND STRIKING OTHER MOTIONS AS MOOT
vs.	)	
REGINALD JOHNSON, et al.,	)	
Defendants.	)	

THIS MATTER comes before the court on cross motions concerning plaintiffs' claims against defendants Seattle Stevedore Company, Edward Lopit and Paul Tomita (hereafter referred to collectively as defendants). Defendants move to dismiss the so-called wrongful controversion claims pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, pursuant to Fed. R. Civ. P. 56. Plaintiff William Sample moves for partial summary judgment establishing

Seattle Stevedore's liability for wrongfully controverting his claim to medical benefits and monetary compensation. Having reviewed the memoranda, affidavits[1] and other materials submitted in support of and in opposition to these motions, and having heard oral argument, the court finds that defendants' motion is well taken. Accordingly, defendants' motion to dismiss the wrongful controversion claims must be granted. The court does not reach plaintiff

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[1] At oral argument, counsel for defendants stated that, in ruling on defendants' motion to dismiss, defendants would not object to the court's consideration of the affidavits that are the subject of plaintiffs' pending Motion for Leave to file Supplemental Affidavits in Opposition to Seattle Stevedore's Motion to Dismiss. The court has considered the affidavits. The motion for leave to file the supplemental affidavits is hereby stricken as moot.

Sample's motion for partial summary judgment.

Plaintiffs William Sample and James Shelton are injured longshoremen who filed compensation claims under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. Sections 901-950. Plaintiffs were employed by Seattle Stevedore Company when they allegedly sustained the injuries entitling them to benefits under the Act. As the responsible employer and a self-insurer under the Act, Seattle Stevedore has a duty to provide plaintiffs the LHWCA benefits to which they are entitled. Defendant Edward Lopit, an Assistant Claims Manager for Seattle Stevedore, participated in the processing of plaintiffs' LHWCA claims. Defendant Paul Tomita is a certified vocational rehabilitation counselor with whom Seattle

Stevedore contracted to provide job placement services to plaintiff Shelton.

Plaintiffs commenced this action alleging in a conclusory manner that defendants Seattle Stevedore, Lopit and Tomita acted in bad faith and fraudulently by controverting plaintiffs' claims despite knowledge that plaintiffs were entitled to benefits under the Act, that no reasonable grounds existed for controverting the claims, and that the plaintiffs would be deprived of LHWCA benefits pending a hearing on their claims. Plaintiffs assert that defendants' conduct violated the LHWCA, admiralty and maritime law and the federal common law,[2] and caused plaintiffs to suffer

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[2] At oral argument plaintiffs' counsel was asked whether the complaint stated any claims for relief under state law. In reply, counsel stated that the tort of

(Footnote Continued)

emotional and financial distress. See[3] Second Amended Complaint "Counts" IV and V. Jurisdiction over these claims (referred to by the parties, and by the court, as the

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(Footnote Continued)
outrage was the only state law claim which arguably had been alleged. Counsel further stated that in the event the court dismissed the claims under federal law, the court would lack jurisdiction over the outrage claim and a dismissal of this claim without prejudice would be appropriate.

[3] Plaintiffs have filed a motion for leave to file a Third Amended Complaint. According to plaintiffs "[t]he only arguable new claim against defendants [in the Third Amended Complaint] is the one which alleges negligence in Shelton's vocational rehabilitation process." Memorandum in Support of Motion for Leave to File Third Amended Complaint at 2. Adding this claim to he allegations in the Second Amended Complaint would not affect the court's decision to dismiss Amended Complaint would not affect the court's decision to dismiss this action, so the court need not decide whether plaintiffs should be granted leave to file their Third Amended Complaint. The motion for leave to file the Third Amended Complaint is hereby stricken as moot.

wrongful controversion claims) is invoked under 28 U.S.C. Sections 1331 and 1333.

Three issues are presented by defendants' motion: First, whether plaintiffs' wrongful controversion claims are cognizable in admiralty; second, whether a violation of Section 907(a) or Section 908(c)(21) of the Act gives rise to a private cause of action for damages; and finally, whether plaintiffs' wrongful controversion claims are barred by the exclusive liability provision contained in Section 905(a) of the Act. These issues will be addressed in turn.

I.

As an initial matter, it must be determined whether this case falls within the admiralty jurisdiction of the court. For a tort action like this to be cognizable in admiralty, the tort must have "occurred

on or over navigable waters" (maritime locality test) and "the tort must also arise in the course of a traditional maritime activity" (maritime relationship test). Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967, 969-70 (9th Cir. 1983). Plaintiffs' wrongful controversion claims satisfy neither of these tests.

The wrongful controversion claims are based upon the actions taken by defendants to controvert plaintiffs' LHWCA claims. The acts complained of occurred solely on land, so the maritime locality test cannot be met. In urging the contrary conclusion plaintiff confuse the locality where their injuries entitling them to LHWCA benefits occurred with the locality where the controversion of their claims occurred. See Supplemental Brief Re: New Matters Raised in Defendants'

Reply to Opposition to Motion for Protective Order.

To determine whether an alleged tort bears a significant relationship to traditional maritime activity, this court must consider four factors:

> (1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injury suffered.

Owens-Illinois, 698 F.2d at 970. In Owens-Illinois, the Ninth Circuit held that claims related to asbestos exposure which occurred during the construction of ships that were floating on navigable waters do not bear a significant relationship to traditional maritime activity. Id. at 971. The facts in the instant case are even weaker.

No maritime vehicles or instrumentalities were involved in the tort

which allegedly occurred here. Traditionally, admiralty law has provided no special protection to longshoremen. The relationship between the parties is one of employer and employee, or insurer and beneficiary, neither of which has much to do with admiralty. Lastly, the causation and nature of the injury is more akin to the state law tort of infliction of emotional distress than to anything in admiralty law. The causation and nature of the injury suffered by plaintiffs is certainly not unique to admiralty. The court finds that the alleged wrongful controversion of plaintiffs' compensation claims does not bear a significant relationship to traditional maritime activity. Plaintiffs' claims are not within the ambit of the court's admiralty jurisdiction.

II.

Plaintiffs assert that defendants violated Sections 907 and 908 of the LHWCA by terminating payment of medical and compensation benefits to plaintiffs notwithstanding knowledge that plaintiffs are entitled to those benefits. See 33 U.S.C. Section 907(a) (the employer shall furnish such medical treatment for such period as the nature of the injury requires); 33 U.S.C. Section 908(c)(21) (compensation for permanent partial disability shall be two-thirds of the loss in wage earning capacity, payable during the continuance of the partial disability). Asserting "[i]t is black letter law that violation of a statutory duty gives rise to a cause of action under common law," plaintiffs contend that defendants' alleged violation of the Act will support an action for damages in federal court. Memorandum in

Favor of William Sample's Motion for Summary Judgment at 4. Plaintiffs are not seeking recovery of the benefits prescribed by Sections 907 and 908 of the Act; it is undisputed that Seattle Stevedore ultimately provided these benefits to plaintiffs. Instead, plaintiffs claim damages for emotional and financial distress allegedly resulting from the failure of defendants to timely provide the benefits.

Plaintiffs have apparently overlooked Cort v. Ash, 422 U.S. 66 (1975) which sets out four factors that are relevant in determining whether a private right of action may be implied to enforce the provisions of a statute which does not expressly provide such a right. The Cort v. Ash factors are as follows:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," --that is, does the statute create a federal right in favor of the

663 F.2d 861, 864 (9th Cir. 1981), cert. denied, 459 U.S. 881 (1982). Examination of the second and third Cort v. Ash factors is helpful in determining Congress' intent.

Implying a private right of action for damages resulting from violation of Sections 907 or 908 would be inconsistent with other sections of the Act and its legislative history. When considering what remedy was appropriate where an employer failed or refused to pay compensation or provide medical treatment when due, Congress did not expressly permit a private right of action. The Act expressly provides for such actions in only two situations: first, where the employer fails to secure payment of compensation and benefits as required by the Act, 33 U.S.C. Section 905(a), and second, where an employer fails to comply with a final compensation order awarding benefits to an injured employee, 33 U.S.C. Section

treatment. But, the fact that rights were conferred on certain individuals does not necessarily lead to the conclusion that Congress intended to create a private cause of action for damages to remedy a denial of the rights. Cf. Fisher v. City of Tucson, 663 F.2d 861, 864 (9th Cir. 1981), cert. denied, 459 U.S. 881 (1982). Examination of the second and third Cort v. Ash factors is helpful in determining Congress' intent.

Implying a private right of action for damages resulting from violation of Sections 907 or 908 would be inconsistent with other sections of the Act and its legislative history. When considering whet remedy was appropriate where an employer failed or refused to pay compensation or provide medical treatment when due, Congress did not expressly permit a private right of action. The Act expressly provides for such actions in only two situations: first, where the

employer fails to secure payment of compensation and benefits as required by the Act, 33 U.S.C. Section 905(a), and second, where an employer fails to comply with a final compensation order awarding benefits to an injured employee, 33 U.S.C. Section 921(d). Rather than permitting a private right of action, Congress provided certain penalties for the failure to pay compensation when due and provided for reimbursement of employees who incur expenses for medical treatment the employer neglects or refuses to provide. See 33 U.S.C. Sections 914(e) and (f) (increasing the amount of compensation due by 10% or 20%), 928(a) (attorney's fees), 907(d) (reimbursement of medical expenses). Permitting recovery of damages in addition to the penalties provided by the Act, as plaintiffs suggest, would arguable contravene the exclusive liability

provisions of the Act by extending an employer's liability beyond the statutorily prescribed liability. 33 U.S.C. Sections 905(a), 933(i). (See Section III for discussion of the exclusive liability provisions). The inconsistencies that would result if a private right of action is implied strongly suggest that Congress did not intend to create such a remedy.

Implying a private cause of action for violation of Sections 907 and 908 would also be inconsistent with the underlying purpose of the legislative scheme. The fundamental purpose of the LHWCA is to assure that prompt aid reaches the injured employee when his need is greatest. This purpose is attained by (1) imposing an absolute but limited liability on employers for the payment of medical and compensation benefits to injured employees, and (2) resolving disputes between employers and injured

employees through an administrative process that emphasizes informal and nonjudicial means of resolving disagreements. Implying a private right of action would likely increase the number of litigated disputes thereby undercutting the administrative dispute resolution procedure and increasing the amount of the employers' limited financial resources which are expended in the defense of actions rather than in the payment of benefits. Cf. Oman v. Johns-Manville Corp., 482 F. Supp. 1060, 1069 (E.D. Va. 1980), aff'd, 662 F.2d 243 (4th Cir. 1981). Also, holding employers liable for amounts in excess of those prescribed by the Act would deprive employers of the limited liability which is the basis of all workmen's compensation acts.

As to the fourth Cort v. Ash factor, providing workmen's compensation for injured

longshoremen is clearly an area of federal concern. On the other hand, to the extent that the cause of action in question is really one for emotional distress, it falls within the bounds of traditional state tort law. On balance, the court finds this factor is not of particular influence in its decision.

The court is convinced that Congress did not intend to create a private right of action for damages to remedy violations of Sections 907 and 908 of the LHWCA. Congress expressly created a private right of action for violation of other, more fundamental sections of the Act, which leads the court to believe that the failure to provide such a remedy for violation of Sections 907 and 908 was no mere oversight. The legislative history contains no evidence that Congress intended to create such a remedy. Instead, the legislative history and the statutory

language suggest that Congress thought that the way to deter violations of Sections 907 and 908 was to impose penalties that would be assessed through the administrative process. In these circumstances the court will not imply a private cause of action. The court therefore has no occasion to decide whether defendants violated Sections 907 or 908 of the Act.

III.

The remaining issue before the court is whether plaintiffs have stated a claim for relief under the common law which is not barred by the exclusive liability provision of the Act. See 33 U.S.C. Section 905(a). Section 905(a) provides that "[t]he liability of an employer [under the Act] . . . shall be exclusive and in place of all other liability of such employer to the employee . . . ." Id.; see, also, 33 U.S.C.

Section 933(i) (stating that recovery under the Act is the exclusive remedy against co-employees of the injured employee). The Act imposes liability on an employer for accidental injury or death arising out of and in the course of employment. See 33 U.S.C. Sections 902(2), 904, 907-908. Thus, an employer is generally not liable under the Act for an intentionally inflicted injury but, conversely, the employer does not receive the benefit of the exclusive liability provision for such injuries. See Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316 (D. Me. 1981).

In resolving the issue before the court it should be remembered that the LHWCA represents a compromise between the competing interests of longshoremen and their employers and that the exclusive liability provision is a central element of the compromise. "In return for the

guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, [who gives up certain common-law defenses to liability] the reward for securing compensation is immunity from employee tort suits." Washington Metropolitan Area Transit Authority v. Johnson, 104 S.Ct. 2827, 2831-32 (1984). Additionally, strengthening the exclusive liability provision was one of the primary purposes behind the 1972 amendments to the Act. See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 261-62 (1977).

The importance of the exclusivity provision within the LHWCA scheme dictates a broad interpretation of the phrase "arising out of and in the course of employment," which delimits the accidental injuries covered under the Act. 33 U.S.C. Section 902(2). Such an interpretation also permits

injured longshoremen to obtain benefits for the broadest possible range of injuries. Courts in several cases have viewed expansively the injuries which are subject to the exclusive liability provision. See, e.g., Lindsay v. George Washington University, 279 F.2d 819 (D.C. Cir. 1960); Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 318 (D. Me. 1981).

The question presented in Lindsay was whether the exclusive remedy provision of the Act precludes an action for alleged malpractice in the treatment of a compensable injury at the employer's hospital. The court answered the question in the affirmative, finding that the employer is responsible under the Act for all legitimate consequences that flow from a compensable injury, including the unskillfulness or error of judgement by the physicians furnishing the medical treatment

required by the Act. The court held that the liability imposed by the Act was the plaintiff's exclusive remedy and that the action was thus barred. Id. at 820-21. Similarly, in the instant case recovery under the Act should be the plaintiffs' exclusive remedy against Seattle Stevedore for any negligence in processing plaintiffs' compensation claims.

As previously discussed in Section II, Congress considered what remedy was appropriate where an employer fails to pay compensation or provide medical benefits in a timely fashion. Congress enacted certain penalties where are assessed whether the failure is inadvertent or intentional. The apparent purpose of these penalties is to discourage the very sort of behavior alleged here. These penalties are not insubstantial: for example, on Shelton's claim the ALJ assessed almost $6,300 in

attorney's fees and prejudgment interest against Seattle Stevedore.[4]

In the great majority of cases a cause of action has been held not to lie where it is alleged that an employer or its insurer wrongfully delayed or refused to make compensation or medical payments when due. 2A A. Larson, Workmen's Compensation Law Section 68.34(c) at 13-72. Larson opines that "[t]he temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in

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[4] Plaintiffs' remedy under the Act for the failure of Seattle Stevedore to provide benefits when due is not necessarily limited to the statutory penalties. Plaintiff Shelton, for example, was awarded benefits by the ALJ for his "Mental Health Sequelae" which flowed from his physical injury. The emotional distress for which Shelton now seeks damages may have been a part of the mental health problems considered by the ALJ--which raises the possibility of a double recovery against Seattle Stevedore.

payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize [a cause of action] . . . except in cases of egregious cruelty or venality." Id. at 13-76 (footnotes omitted). Larson cites Martin v. Travelers Insurance Co., 497 F.2d 329 (1st Cir. 1974), upon which plaintiffs rely, as a case where the defendant's conduct was "conspicuously contemptible." Id.

In Martin v. Travelers Insurance the plaintiff, a LHWCA claimant, received three drafts totalling over $5,700 from his former employer's insurer in satisfaction of an award under the Act. Two weeks after the drafts were deposited and substantially drawn upon, the insurer stopped payment on them. This caused the plaintiff to suffer financial embarrassment, emotional distress

and severe physical impairment. 497 F.2d at 330. The plaintiff's suit, which alleged tortious infliction of mental and emotional suffering, was dismissed by the district court pursuant to Fed. R. Civ. P. 12(b)(6). The First Circuit reversed, holding that the exclusive liability provision of the Act did not preclude the plaintiff from pursuing whatever independent state law remedy was recognized for the insurer's conduct. Id. at 331. Significantly, the court did not find that violation of the LHWCA gives rise to a private cause of action or that the bad faith termination of LHWCA benefits is itself actionable.

The court in Martin v. Travelers Insurance had three alternative rationales for its holding, one of which was that:

> [t]he damage which is the basis of this suit did not arise out of or in the course of employment nor was the damage caused by a third person because of plaintiff's

> employment. Instead the damage was allegedly incurred in the course of and arising out of plaintiff's status as a claimant seeking compensation, after his status as an employee had terminated.

Id. at 330-31. No authority was cited by the court, nor was there any discussion of the case law and policies reviewed above. This court declines to follow Martin v. Travelers Insurance. Although the court can understand the tendency to find Section 905(a) inapplicable where the defendant violates the express and unambiguous terms of the Act and serious injuries result to the plaintiff, the court finds persuasive the policies and reasoning discussed above, in addition to the need for a uniform and consistent rule. The court concludes that the injuries alleged by plaintiffs do arise out of and in the course of their employment. Defendants are thus entitled to

the protection of the exclusive liability provision of Section 905(a).

It remains to be decided whether plaintiffs have stated a claim for relief under state law which falls within the exception to Section 905(a) for intentionally inflicted injuries. At oral argument, counsel for plaintiffs indicated that the tort of intentionally inflicted emotional distress (outrage) was the only state law claim arguably alleged in the Second Amended Complaint. The complaint does not allege that the plaintiffs suffered severe emotional distress, that the emotional distress was inflicted intentionally or recklessly,[5] or that the

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[5] Section 905(a) would bar an outrage claim based on recklessly inflicted emotional distress. To fall within the exception to Section 905(a), plaintiffs must (Footnote Continued)

conduct of the defendants was outrageous and extreme. Each of these allegations is an essential element of a claim for outrage. Grimsby v. Samson, 85 Wn. 2d 52 (1975). Accordingly, the court finds that the complaint does not allege an outrage claim or any other state law claim for intentionally inflicted injury. Cf. Bowe v. Eaton, 17 Wn. App. 840, 845 (1977). The court need not decide whether plaintiffs could allege a state law claim for intentionally inflicted injury because even if such a claim was stated, this court would lack subject matter jurisdiction over it.

(Footnote Continued)
prove that their emotional distress was intentionally inflicted by defendants. Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316 (D. Me. 1981).

IV.

In conclusion, the court has ruled (1) that plaintiffs' claims are not cognizable in admiralty, (2) that a private cause of action does not exist for violation of the LHWCA, and (3) that Section 905(a) bars the plaintiffs' claims. Finding that no genuine issues of material fact exist, and that defendants are entitled to judgement as a matter of law, defendants' motion for dismissal is hereby GRANTED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 13th day of August, 1984.

BARBARA J. ROTHSTEIN,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM SAMPLE and KAREN SAMPLE, husband and wife, and JAMES SHELTON,	NOS. 84-4134, 84-4240
Plaintiffs-Appellants/cross-appellees,	D.C.No. CV-83-1060R
vs.	ORDER
REGINALD JOHNSON, et al.,	
Defendants-Appellees/cross-appellants.	

Before: PREGERSON, and WIGGINS, Circuit Judges and SCHNACKE,*

Plaintiffs' petition for rehearing is denied.

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* Honorable Robert R. Schnacke, United States District Judge for the Northern District of California, sitting by designation.

The opinion filed on September 20, 1985 is hereby amended as follows:

On page 2, the first paragraph of the "FACTS" is amended to read:

"The facts are not disputed. Sample was injured on March 28, 1983; Shelton was injured on April 26, 1982. Sample received compensation from Seattle Stevedore from April 8 to June 1, 1983. The employer controverted his claim on June 15, 1983, and a hearing was held before an ALJ on March 17, 1984. On April 24, 1984, Sample received an award of LHWCA compensation. Sample was without income during the more than ten months between the controversion and the award."

On page 20, line 24, "contravention" is amended to read "controversion."